

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55424; File No. SR-Phlx-2006-63)

March 8, 2007

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Amendment No. 3 to the Proposed Rule Change, and Order Granting Accelerated Approval of Proposed Rule Change as Amended, Relating to a Philadelphia Board of Trade Enterprise License Fee for Dissemination of Certain Market Data

I. Introduction

On September 28, 2006, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposal add an Enterprise License Fee of \$10,000 per year or \$850 per month that would be assessed by the Exchange’s wholly owned subsidiary, the Philadelphia Board of Trade (“PBOT”), on eligible market data vendors or subvendors (collectively “Vendors”) for certain index values that subscribers receive over PBOT’s Market Data Distribution Network (“MDDN”). The Phlx filed Amendment No. 1 to the proposed rule change on November 1, 2006 and filed Amendment No. 2 on December 20, 2006. The proposed rule change, as amended, was published for comment in the Federal Register on December 28, 2006.³ The Phlx filed Amendment No. 3 to the proposed rule change on March 2, 2007.⁴ The Commission received no comments regarding the proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 54978 (December 20, 2006), 71 FR 78254.

⁴ In Amendment No. 3, Phlx clarified (1) in its fee schedule that a retail broker dealer is conducting a material portion of its business via one or more Internet Web sites if at least 20% of the broker-dealer’s business were conducted via the Internet; and (2) that the current and closing index values underlying all of Phlx’s proprietary indexes are being disseminated through PBOT.

The Commission hereby issues notice of the filing of Amendment No. 3 and simultaneously grants accelerated approval to the proposed rule change as amended.

II. Description of the Proposal

The Phlx proposes to add an Enterprise License Fee for eligible Vendors of market data disseminated over PBOT's MDDN.⁵ The Phlx has licensed the current and closing index values underlying all of the Phlx's proprietary indexes to PBOT for the purpose of selling, reproducing, and distributing the index values over PBOT's MDDN ("Market Data"). On each trading day, the Exchange or its third party designee calculates and makes available to PBOT a real-time index value every 15 seconds and a closing index value at the end of each trading day. In exchange for subscriber fees paid to PBOT, market data vendors are allowed to widely disseminate all the values of Phlx's proprietary indexes to their subscribers.⁶

As approved by the Commission, PBOT charges the following subscriber fees to Vendors of Market Data for all the values of Phlx's proprietary indexes disseminated by PBOT's MDDN:⁷ a monthly fee of: (a) \$ 1.00 per "Device,"⁸ that is used by Vendors and their

⁵ The MDDN is an internet protocol multicast network developed by PBOT and SAVVIS Communications.

⁶ PBOT has contracted with one or more major Market Data Vendors to receive real-time and closing index values over the MDDN and promptly redistribute such values.

⁷ See Securities Exchange Act Release No. 53790 (May 11, 2006), 71 FR 28738 (May 17, 2006) ("Original Approval Order"). The subscriber fees are set out in agreements that PBOT executed with various market data vendors for the right to receive, store, and retransmit the current and closing index values transmitted over the MDDN.

⁸ The agreements provide that "Device" shall mean, in case of each Subscriber and in such Subscriber's discretion, either any Terminal or any End User. A Subscriber's Device may be exclusively Terminals, exclusively End Users or a combination of Terminals or End Users and shall be reported in a manner that is consistent with the way the Vendor identifies such Subscriber's access to Vendor's data. An "End User" is defined as an individual authorized or allowed by a Vendor to access and display real-time market data that is distributed by PBOT over the MDDN; and a "Terminal"

subscribers to receive and re-transmit Market Data on a real-time basis (“device fee”), and (b) \$.0025 per request for snapshot data,⁹ which is essentially Market Data that is refreshed no more frequently than once every 60 seconds, or \$1,500 per month for unlimited snapshot data requests (“snapshot fee”).¹⁰ All market data vendors which provide market data to 200,000 or more Devices in any month qualify for a 15% Administrative Fee credit for that month, to be deducted from the monthly Subscriber Fees that they collect and are obligated to pay PBOT under the Vendor/Subvendor Agreement.

The Exchange proposes to add an Enterprise License Fee of \$10,000 per year or \$850 per month that would be available to eligible Vendors as an alternative to the device fee or snapshot fee.¹¹ A Vendor is eligible for the Enterprise License Fee if it is a firm acting as a retail broker-dealer conducting a material portion of its business via one or more proprietary Internet Web sites by which the firm distributes Market Data to predominately non-professional Market Data users with whom the firm has a brokerage relationship (“Eligible Firm”).¹² An Eligible Firm may also distribute Market Data to professional users with whom such firm has a brokerage relationship, provided such Market Data distribution is predominantly to non-professional

is any type of equipment (fixed or portable) that accesses and displays such market data.

⁹ See Securities Exchange Act Release No. 55111 (January 16, 2007), 72 FR 3188 (January 24, 2007) (increasing the snapshot fee to \$.0025 per request).

¹⁰ The index values may also be made available by Vendors on a delayed basis (*i.e.*, no sooner than twenty minutes following receipt of the data by vendors) at no charge.

¹¹ A firm that qualifies for the Enterprise License Fee may instead choose to pay the device fee and/or the snapshot fee as appropriate.

¹² To be eligible for the Enterprise License Fee, the Exchange’s fee schedule states that an Eligible Firm will be considered to conduct a material portion of its business via one or more Internet Web sites if at least twenty percent (20%) of the firm’s business were conducted via the Internet.

users.¹³ As stated in the proposed fee schedule, the Eligible Firm's Market Data distribution to professional users cannot exceed 10%.¹⁴ The 15% Administrative Fee credit discount also applies to the Enterprise License Fee.

To be eligible for the Enterprise License Fee, an Eligible Firm must certify to PBOT that it qualifies for the Enterprise License Fee, including that market distribution is predominantly to non-professional users, and must immediately notify PBOT if it can no longer certify its qualification.¹⁵

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

¹³ A non-professional user is defined in the fee schedule as any natural person who is not: (a) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (b) engaged as an "investment advisor" as that term is defined in Section 202(11) of the Investment Advisors Act of 1940, 15 U.S.C. 80b-2(11), (whether or not registered or qualified under that Act); nor, (c) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

¹⁴ As an example, if data recipient ABC Corp. has 100 customers that receive PBOT Market Data of which 10 are professional users and 90 are retail (non-professional) users the Enterprise License Fee would be available to the firm because $10 \text{ professional users} / 100 \text{ total users} = 10\%$.

¹⁵ A firm that has entered into an agreement with PBOT to receive Market Data over the MDDN but is not qualified for the Enterprise License Fee may pay the device fee and/or the snapshot fee as appropriate.

- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-Phlx-2006-63 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2006-63. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2006-63 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

IV. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to

a national securities exchange¹⁶ and, in particular, the requirements of Section 6 of the Act.¹⁷ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁸ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the reduced alternate fee structure available through the Enterprise License Fee to eligible market data recipients should help to encourage a wider distribution of market data, especially to non-professional customers. The Commission notes that other industry organizations have similar fee structures which make various market data available to non-professional subscribers for a discounted fee relative to professional subscribers. For example, the Nasdaq Stock Market, Inc. (“Nasdaq”) has fees schedules that are higher for professional or corporate subscribers than for non-professional subscribers for UTP Level 1 fees, TotalView fees, and Nasdaq MAX fees.¹⁹ The Options Price Reporting Authority (“OPRA”), a national market system plan, also offers a reduced fee to nonprofessional subscribers, which is not available to professional options data subscribers.²⁰

¹⁶ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f.

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ Nasdaq offers a TotalView Non-Professional Enterprise Fee License to qualified firms that distribute TotalView to their non-professional users with whom they have a professional relationship. A description of Nasdaq market data fees is available at <http://www.nasdaqtrader.com/trader/mds/nasdaqother/pricing.stm> (last visited on January 17, 2007).

²⁰ A description of OPRA market data fees is available at http://www.opradata.com/pdf/prof_pub_fee_schd_revised.pdf (last visited on January 17, 2007).

The Commission also believes that Phlx's eligibility standards in determining the type of retail broker-dealers who can use the new Enterprise License Fee appears to be reasonably related to its purpose of providing a discount to those retail broker-dealers who have primarily a proprietary Internet based business to non-professional users.²¹ As noted above, eligible firms are also free to pay, as an alternative, the device fee or snapshot fee should they so choose.

Based on the above, the Commission believes that the proposal is consistent with Section 6(b)(4) of the Act,²² in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members and issuers and other persons using its facilities. The Commission also continues to believe that PBOT's MDDN fee structure is consistent with Rule 603 under the Act²³ regarding the distribution, consolidation, and display of information with respect to quotations for and transactions in NMS stocks.

The Commission finds good cause for approving Amendment No. 3 to the proposed rule change prior to the thirtieth day after the notice is published for comment in the Federal Register pursuant to Section 19(b)(2) of the Act.²⁴ Amendment No. 3 clarifies the Exchange's proposal and does not raise any new regulatory issues. Further, the materiality standard in the Eligible Firm definition drafted into the fee schedule pursuant to Amendment No. 3 was the same standard published for comment with the filing and no comments were received. Finally, the Commission believes that it is appropriate to accelerate approval of the proposed rule change so that the Exchange can immediately provide the discounted fee to eligible firms that will disseminate the index values of Phlx's proprietary index options. Accordingly, the Commission

²¹ See supra notes 12-15 and accompanying text for eligibility standards for the Enterprise License Fee.

²² 15 U.S.C. 78f(b)(4).

²³ 17 CFR 242.603.

²⁴ 15 U.S.C. 78s(b)(2).

finds good cause to approve Amendment No. 3 prior to the thirtieth day after the notice is published for comment in the Federal Register.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁵ that the proposed rule change (SR-Phlx-2006-63), as amended, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁶

Florence E. Harmon
Deputy Secretary

²⁵ 15 U.S.C. 78s(b)(2).

²⁶ 17 CFR 200.30-3(a)(12).